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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

NO. 81-2166

J. RICHARD BARBER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The government attempts to avoid the Hobbs Act presumption created by the Court of Appeals in this case, by arguing that the prosecution affirmatively proved that the liquor companies participated in the withdrawal system because of a reasonable feeling of compulsion. The government's brief (at 3) states that

"[a]lthough a few company representatives accepted petitioner's system as a promotional device, most expressed displeasure at this forced tribute." The Court of Appeals reached the opposite conclusion, however, and acknowledged that "a majority of the companies considered the withdrawal practice to be a valid 'promotional' device [although] some company officials resented the defendant's excessive withdrawals" (Pet. App. 21a).

The Court of Appeals' opinion does not even purport to be based on affirmative evidence of compulsion. The Fourth Circuit's affirmance of the Hobbs Act and RICO convictions[1] is based upon

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[1] Seventeen bribery charges, supported solely by the bizarre testimony of David Robbins which is recounted by the government in its brief, constituted the only non-extortion charges underlying the RICO count. In response to petitioner's challenge to the sufficiency of this evidence to establish bribery, the Court of Appeals simply ignored the charges, and affirmed the RICO conviction based upon the extortion charges alone (Pet. App. 23a). It is quite possible that the jury did likewise, since Robbins' credibility was highly questionable and the extortion

(footnote continued)

only two facts in the record -- that petitioner held public office and that he received property from companies doing business in the state. These facts, according to the Court's unequivocal language, are sufficient to establish extortion "absent a convincing explanation" by the defendant: "No such convincing explanation has been forthcoming here. Its absence provides an adequate basis for an inference that ... there was nothing voluntary about the withdrawals" (Pet.App. 16a)(emphasis added).

The government's contention also is unsupported by the actual evidence in the case: out of a 1747 page trial transcript, involving twenty-six alleged acts of extortion with twenty separate companies as "victims",[2] the government has found

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charges alone were sufficient to establish the RICO predicate crimes.

[2] Twenty-two of these charges, involving sixteen separate companies, were submitted to the jury. Six of the charges formed
(footnote continued)

testimony by three witnesses who "expressed displeasure" with the withdrawal system. These witnesses' testimony relates to only two of the six substantive Hobbs Act charges, and fails to adequately support even those two.

The government's first find, Robert McLean, whose memos to a colleague characterized some withdrawals as "rape", was vice-president of Joseph E. Seagram & Sons, the parent company of Calvert Distillers, the "victim" of Count 3. However, the "rape" memos quoted by the government related solely to withdrawals from a separate corporate entity, Seagrams Distillers, which were not the subject of any of the substantive Hobbs Act charges.[3]

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the substantive Hobbs Act counts; the remainder served as predicates for the RICO count.

[3] These withdrawals, along with those from other Seagrams subsidiaries, were charged together as one predicate crime of extortion in the RICO count of the indictment.

The Seagrams Distillers withdrawals had been authorized by the company's West Virginia state manager, Joseph Prino (C.A. (footnote continued)

The Calvert Distillers' withdrawals which were charged in Count 3 had been authorized by Calvert's West Virginia state manager, John Saladini. Saladini specifically denied that petitioner had "at any time ... expressly or impliedly" asked for authorizations for liquor withdrawals or exacted any tribute as a cost of doing business in the State (C.A. App. 546). Furthermore, Saladini stated that, when petitioner assumed office, Salidini had gone to him and voluntarily given him express and unlimited authority to withdraw Calvert products[4] (Id.).

App. 752). Prino and McLean disagreed strongly regarding the use of the withdrawal system as a promotional device (C.A. App. 756). Despite McLean's disagreement, Prino felt that the system was "a real good vehicle" for promotion (C.A. App. 759) and gave petitioner "general authority" to make withdrawals (C.A. App. 757). Prino testified that, in authorizing the withdrawals, "I never ever felt that I was paying the commissioner. I used that as a tool to get the product in the hands of the prospective consumer" (C.A. App. 769).

[4] In view of the district court's instructions to the jury in this case -- that the Hobbs Act charges required proof

(footnote continued)

The government's second discovery, Robert Weisenberger, was control states manager for the James Beam company during most of petitioner's tenure in office. Beam conducted its business in West Virginia solely through a broker, John Sims. Sims regularly signed withdrawal forms sent to him by petitioner's office, and then forwarded the signed forms to Weisenberger together with a cover letter stating that the liquor and been "withdrawn from the warehouse by the Commissioner" and requesting that its cost be credited to the state's account (C.A.App. 362-65). Weisenberger testified that he did not object to most of petitioner's withdrawals, "for entertaining purposes [or] whatever they might have been", and that his objection to the particular withdrawal charged in

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that petitioner was "the initiator or inducer of the obtaining of the money or property" (C.A. App. 950) -- Saladini's uncontradicted testimony actually negates an essential element of this charge.

Count 2 was "because this was something out of the norm ... it was too much" (C.A. App. 373, 376). Weisenberger testified that when he objected to Sims about this withdrawal, Sims personally paid for the withdrawn merchandise. (C.A. App. 377-78, 388). There was no evidence whatsoever that either Sims, who had died prior to trial, or Weisenberger felt any compulsion to authorize any withdrawal.

Finally, the government seizes upon the testimony of Charles Buscher, who was vice-president of Schenley Affiliated Brands, the "victim" of the Hobbs Act violation charged in Count 4 of the indictment. Despite his prophecy, quoted in the government's brief, that the "sample withdrawals are going to get [petitioner] in serious trouble" -- a statement based solely upon his belief that the particular method used for withdrawals might violate Internal Revenue Service regulations (C.A. App. 166, 174) -- Buscher emphasized that he never

thought that the withdrawal system might constitute a criminal violation (C.A. App. 168, 171). More importantly, he unequivocally stated that petitioner never advised him "expressly, explicitly or impliedly" that a refusal to authorize withdrawals might result in official sanctions, and that he did not believe that his company's relationship with petitioner would have been harmed "in any way" if he had refused to participate in the withdrawal system (Pet. App. 116a-117a). The only harmful result Buscher feared from non-participation was the loss of the system's promotional value for his company's products (Id.).

Buscher was also the government's only witness regarding a RICO predicate crime based upon petitioner's alleged extortion of a campaign contribution. His testimony with respect to this charge also negates any possible inference of compulsion:

> Q: What was the business interest that caused you to meet

Mr. Barber's request for these funds for a gubernatorial campaign in West Virginia?

A: Schenley Industries enjoyed a good business in the State of West Virginia and we naturally wanted our manpower and our company to maintain that relationship and the amount of business that we were personally doing in the state.

Q: How would that contribution assist in that regard?

A: The contribution in that regard, how it would assist, we would naturally assume that that would bring about the election or the re-election and the continuation of Mr. Barber as Commissioner, and as far as Schenley Industries were concerned ... the entire system had changed to the benefit not only of our company ... but to the other companies as well.

Q: The re-election of whom?

A: That would be the existing -- the present Governor at that time, which was Governor Moore... I was more concerned about the reappointment of Mr. Barber because of the job he had done...

Q: Did Mr. Barber with respect to the political contribution, did he by anything he said, anything he did, anything he might have written, any gesture or mannerism, convey to you any kind of threat that if you didn't make a political contribution to Governor Moore,

you would suffer some kind of economic sanctions?

A: No, sir (Pet. App. 121a-122a).

With respect to the other three substantive Hobbs Act counts of the indictment, the evidence of compulsion was simply non-existent. Two of these charges (Counts 19 and 20) were based upon withdrawals charged to the manufacturers, National Distillers and Gallo Winery, through affidavits normally used for damaged merchandise. The only witnesses who testified about these charges, the ABCC warehouse supervisor and the petitioner, stated that representatives of both companies had suggested that this method be used for withdrawals of their products. No company representatives appeared as witnesses regarding these charges, and there was simply no evidence that their participation in the system was anything but voluntary. The final Hobbs Act count (Count 5) was based upon withdrawals of Heublein's Smirnoff Sales

Company, which were authorized by Jack Asay, Smirnoff's state representative. Asay testified that when petitioner first assumed office, Asay authorized him to make withdrawals of Smirnoff products and assured him that the company would approve them[5] (C.A.App. 649-50). Asay unequivocally stated that he felt no sense of compulsion to permit withdrawals, and had no fear that a refusal to do so would result in retaliation. (Pet. App. 115a).

In summary, the government's attempt to avoid the Fourth Circuit's reasoning, by claiming that the government's affirmative evidence would support a finding of compulsion, has no basis in the record of this case or in the opinion of the Court of Appeals.

2. The government contends that, before permitting the extensive questioning of petitioner regarding his

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[5] The testimony as to this count, as well as to Count 3, negated the charge that petitioner had initiated the alleged extortion. See n.3, supra.

failure to appear before the grand jury which indicted him, the district court offered him an opportunity to "amend" his previous testimony. The record shows otherwise. The only option permitted by the district court was a flat retraction by petitioner of his sworn testimony (C.A. App. 862-63). Petitioner properly rejected this draconian alternative on the grounds that his testimony -- that he had never denied the existence or extent of the withdrawal system -- was not inconsistent with his refusal to assist the government by appearing before a grand jury after his indictment had become a fait accompli.

There are really only two inconsistencies in this case. The first is between the opinion of the Fourth Circuit and this Court's opinion in Grunewald v. United States, 353 U.S. 391 (1957). The second is between the Fourth Circuit's opinion and those of the other Courts of Appeals which recognize that,

even where a defendant might be properly impeached by testimony regarding his assertion of his Fifth Amendment rights, the enormously prejudicial effect of such testimony must be carefully balanced against its probative value. The minimal probative value of the repeated questioning permitted in this case was clearly outweighed by its prejudice to petitioner.

3. The government argues that petitioner "invited testimony concerning guilty pleas [by the liquor companies participating in the withdrawal system] by raising the question of harm" and that evidence of the pleas was properly admitted for impeachment purposes. However, the indictment itself "raised the question of harm", charging that the withdrawal system constituted a scheme to defraud the companies and their shareholders "of the revenue and profit owing and due them" (C.A. App. 36), and the government attempted to establish such

economic harm in its case in chief. In order to negate an essential element of the government's case -- a "showing that some actual harm or injury was contemplated by the schemer", United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970) -- the defense attempted to show that the withdrawals were part of a promotional system which was intended to, and did, benefit both the companies and the state. This questioning by the defense cannot be held to have "opened the door" to the irrelevant and prejudicial evidence of the companies' criminal convictions.

The prosecution theory in this case, both at trial and on appeal, was that the companies were harmed by the convictions resulting from their participation in the withdrawal system, and that this "harm" could justify petitioner's convictions for mail fraud.[6] The Court of Appeals clearly

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[6] The jury was never instructed that the evidence of the company guilty pleas was (footnote continued)

upheld this theory (Pet. App. 21a-22a). The government's attempt to characterize the pleas as mere impeachment evidence[7]

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for impeachment purposes only, and the government's argument throughout the case affirmatively invited the jury to consider the pleas as substantive evidence that petitioner had harmed -- and therefore defrauded -- the companies.

Even if the jury had been instructed to consider the company convictions only for their impeachment value, the admission of the convictions into evidence would have been severely prejudial. Contrary to the suggestion in the government's brief (p.12, n.9), the decisions of the Fifth and Nineth Circuits which are cited in the Petition condemn the introduction of such evidence even for the limited purpose of impeachment, recognizing the unlikelihood of the jury performing mental gymnastics with such inherently prejudical evidence.

[7] Even accepting the government's theory that the convictions proved that the companies had been harmed by petitioner's use of the withdrawal system, most of the witnesses' testimony was not inconsistent with this fact, and therefore did not provide a proper predicate for introduction of the pleas as impeachment evidence. Of the five company representatives whom the government sought to "impeach" through their companies' pleas, only two, Gilbert Breimeister and Elvis Kington, had stated without qualification that their companies had not been harmed by the withdrawal system. William Conover testified that his company had not suffered, but explicitly limited his answer to the period during which the system was in operation. Blaine Peterson

(footnote continued)

cannot change the fact that petitioner was convicted of mail fraud -- and the conviction was affirmed -- at least in part on the theory that he had harmed the companies by causing their criminal convictions. Indeed, the convictions would not even be relevant for impeachment purposes unless they constituted legitimate evidence that the companies had been "harmed" by the withdrawal system. In this case, where the primary issue was the intended and actual effect of the withdrawal system, the evidence of the companies' criminal punishment for participating in the system was devastating.

4. The government argues that the West Virginia Alcohol Beverage Control

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testified only that he had never objected to the withdrawal system when it was operated by petitioner, and that he did not consider the system to be immoral. John Saladini simply stated that he did not believe that petitioner's activities in office had harmed the citizens of the state of West Virginia. The relevant testimony of these witnesses is reprinted as a supplemental appendix attached to this brief.

Commission may be an "enterprise" under the RICO statute, based upon this Court's opinion in United States v. Turkette, 452 U.S. 576 (1981). But the government ignores Turkette's clear statement that "the existence of an enterprise at all times remains a separate element which must be proved by the government," Id. at 583. The government likewise ignores the fact that, in this case, the district court instructed the jury as a matter of law that the ABCC was an "enterprise", and thereby relieved the government of the burden of proving a fact which is, under Turkette, an essential element of the offense.

5. The government suggests that "even if the government had wrongly used" petitioner's prior immunized testimony, the error would be harmless in view of the number of charges in the indictment which were unrelated to the subject matter of the testimony. However, the Fifth Amendment is violated when the government

uses immunized testimony "in any way," Kastigar v. United States, 406 U.S. 441 (1972), even for purposes of impeachment, New Jersey v. Portash, 440 U.S. 450 (1978). Petitioner's trial was contaminated by the introduction of massive amounts of evidence about his collection of political contributions -- the subject of his immunized testimony -- and such a basic constitutional violation cannot be cured in the facile manner suggested by the government.

The government also urges this Court to ignore petitioner's claim that his prosecution was tainted by use of his immunized statements, on the grounds that such a claim is "fact-bound". However, "testimony given in response to a grant of immunity is the essence of coerced testimony" and involves the Fifth Amendment privilege "in its most pristine form." New Jersey v. Portash, 440 U.S. 450, 459 (1978). And this Court has recognized that its "duty is not limited

to the elaboration of constitutional principles; [the Court] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied," New York Times v. Sullivan, 376 U.S. 254 (1964). Petitioner's prosecution by the same jurisdiction which had granted him immunity -- and the government's admitted possession of, and extraordinary interest in, his prior immunized statements -- presents a proper case for this Court to reveiw the evidence to make certain that critical constitutional principles have been correctly applied.

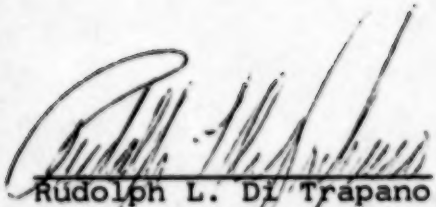
6. The government's brief (at I) states that "the trial court properly declined to hold a hearing on petitioner's allegation of juror bias." In fact, the trial court never had an opportunity to rule on this issue since the government, throughout the trial, withheld the information on which the bias allegation was based. Under these circumstances,

petitioner simply had no means of establishing any more than, in the words of the Court of Appeals, "a potentially suspicious circumstance [and] unverified conjecture" (Pet.App. 31a). The Court of Appeals' ruling provides the government with a powerful incentive to withhold throughout trial any information which casts doubts on a juror's impartiality, by absolutely insulating from challenge any resulting conviction. According to the reasoning of this Court in Smith v. Phillips, 102 S.Ct. 940 (1982) and traditional due process principles, petitioner at least should have been permitted to develop a record in support of his claim, and the trial court should have been given an opportunity to rule on the issue.

Conclusion

For the reasons stated above, petitoner asks this Court to grant his petition for a writ of certiorari.

J. RICHARD BARBER
BY COUNSEL



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SUPPLEMENTAL APPENDIX

Questioning Regarding the Company Guilty Pleas

John Saladini:

By petitioner (C.A.App. 549):

Q: Mr. Saladini, you're a government witness and you're also a salesman and were the state manager in the State of West Virginia for Calvert, and you're also a citizen of the state of West Virginia. As a citizen of the State of West Virginia, do you feel you were injured by the practices of this man on trial today?

A: No.

Q: As a matter of fact, he was the very best Commissioner, public servant, in that office this state has ever had. Isn't that true?

A: It is true.

By the government (C.A.App. 549):

Q: You weren't injured, but your company suffered as a result of your activities

signing those withdrawal forms that Mr. Barber received the merchandise, isn't that correct?

A: Well, what do you mean by injured?

Q: They pled guilty and were convicted in this court and fined.

Gilbert Breimeister:

By petitioner (C.A.App. 461):

Q: As a stockholder in Formost McKesson [parent company of 21 Brands], did those withdrawals on that Form 180 affect your corporation or affect you as a stockholder in any fashion?

A: Not to my knowledge.

By the government (C.A.App. 474-76):

Q: Are you aware, Mr. Breimeister, and I am referring specifically to your statements that your company wasn't adversely affected by these withdrawals -- are you aware of the fact that your company has been convicted in this court in connection with federal crimes relating to these withdrawals?

* * *

A: I am aware of the fact that 21 Brands, my company, was a defendant in a case before this court. Precisely what the conclusion was has never been carefully explained to me.

Q: How about generally?

A: Generally, yes.

Q: Do you generally know that 21 Brands was convicted in this court in December of 1978 for federal crimes relating to transactions on these Form 180's such as are before you, Mr. Breimeister?

A: I am aware of the fact that there were a number of misdemeanors that 21 Brands pled guilty to. If that is considered a conviction, yes, I am aware of that.

* * *

Q: Are you aware of the fact that 21 Brands was fined $10,000 by this court in coneection with its activities relating to these withdrawal forms?

A: I never heard the price.

William Conover:

By petitioner (C.A.App. 284-85):

Q: Did your company suffer in some fashion by this Form 180? How did your company suffer?

A: The company really didn't suffer. Our business over a period of years remained rather static.

Q: So it's a fair statement to say that your company did not suffer in any fashion. Isn't that a correct statement?

A: During this period, yes. You are not talking about my having to turn in my license or be penalized or something?

Q: No...

By the government (C.A.App. 286-87):

Q: You said your company did not suffer from this program. It's a fact your company pled guilty. Isn't that correct?

A: Yes, sir.

Elvis Kington:

By petitioner (C.A.App. 313):

Q: Do you know of anything that those

Form 180's did to hurt the people of the State of West Virginia? Do you know of something that those transactions you have just testified to there did to hurt the citizens of this state?

A: No.

Q: Those transactions also did not hurt your company, did they?

A: We considered it just a part of doing business. It was such a minor thing. We did not consider it a big expense at all.

Q: It didn't hurt your company, did it, Mr. Kington?

A: I would say not.

Q: In fact, you felt those 180's were something of a promotional vein. Isn't that a fair statement?

A: Well, to a certain extent it was putting our brands before the public, if you were going to take it in that category, yes.

By the government (C.A.App. 322):

Q: You have stated in response to a question from Mr. Barber that your actions

in signing those forms indicating you had done something that you had not did not hurt your company. Do you remember saying that?

A: Well, I didn't consider it hurting us because it was such a small amount.

Q: But the fact of the matter is, is it not, Mr. Kington, that because of your signing those statements providing that false information that your company had to walk into this court and plead guilty to federal crimes, isn't that correct?

A: Yes, sir.

Blaine Peterson:

By petitioner (C.A.App. 247):

Q: ... Did you ever come down and have a meeting with Mr. Barber and tell him stop this withdrawal system, this 180 system? Did you ever do that?

A: No, sir, I did not.

Q: You had no objections to it really, did you?

A: No.

* * *

Q: You didn't think anything wrong about it did you?

A: No, I didn't.

Q: You still don't, do you?

A: I know now that it's illegal.

Q: I mean wrong morally. A lot of things in this world that become illegal, but do you feel it's immoral, what you did all this time, all these years?

A: No.

By the government (C.A.App. 249):

Q: When you say you learned it was illegal and you don't consider it immoral, you see nothing immoral in signing documents that state one thing that isn't true?

A: Well, that would be immoral, yes.

* * *

Q: As a matter of fact, you learned it was illegal when you pled guilty to what you had done down here.

A: That's right.

CERTIFICATE OF SERVICE

I, Rudolph L. Di Trapano, counsel of record for petitioner, hereby certify that three copies of the enclosed "Petitioner's Reply to the Brief for the United States in Opposition" were served on the United States by depositing the same in the United States Mail, postage prepaid, addressed to the Solicitor General, Washinton, D.C., on this the 25th day of August, 1982.

Rudolph L. Di Trapano